

American Federalism, 1776 to 2000: Significant Events

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Since ratification of the Constitution, which established a union of states under a federal system of governance, two questions that have generated considerable debate are: What is the nature of the union? What powers, privileges, duties, and responsibilities does the Constitution grant to the national government and reserve to the states and the people? During the 211-year history of the Constitution, these issues have been debated time and again and have shaped and been shaped by the nation's political, social, and economic history.

During the pre-federalism period, the country waged a war for independence and established a confederation form of government that created a league of sovereign states. Deficiencies in the Articles of Confederation prompted its repeal and the ratification of a new Constitution creating a federal system of government comprised of a national government and states. Almost immediately upon its adoption, issues concerning state sovereignty and the supremacy of federal authority were hotly debated and ultimately led to the Civil War.

The period from 1789 to 1901 has been termed the era of Dual Federalism. It has been characterized as an era during which there was little collaboration between the national and state governments. Cooperative Federalism is the term given to the period from 1901 to 1960. This period was marked by greater cooperation and collaboration between the various levels of government. It was during this era that the national income tax and the grant-in-aid system were authorized in response to social and economic problems confronting the nation. The period from 1960 to 1968 was called Creative Federalism by President Lyndon Johnson's Administration. President Johnson's Creative Federalism as embodied in his Great Society program, was, by most scholars' assessments, a major departure from the past. It further shifted the state-national power relationship toward the national government through the expansion of grant-in-aid systems and the increasing use of regulations. Contemporary federalism, the period from 1970 to the present, has been characterized by shifts in the intergovernmental grant system, the growth of unfunded federal mandates, concerns about federal regulations, and continuing disputes over the nature of the federal system. Some of the major disputes during this period were decided by the Supreme Court which ruled, more often than not, in favor of the States.

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Introduction

In 1789, thirteen years after the signing of the Declaration of Independence and eight years after ratification of the Articles of Confederation, which established a league of sovereign states, the nation repealed the Articles of Confederation and ratified a new Constitution creating the United States. Since its ratification the Constitution, which established a union of states under a federal system of governance, two questions have generated considerable debate: What is the nature of the union? What powers, privileges, duties, and responsibilities does the Constitution grant to the national government and reserve to the states and to the people? During the 211-year history of the Constitution the answers to these questions have been debated time and again and have shaped and been shaped by the nation's political, social and economic history.

What is federalism? According to James Q. Wilson and John DiIulio, Jr., it is a system of government "in which sovereignty is shared [between two or more levels of government] so that on some matters the national government is supreme and on others the states, regions, or provincial governments are supreme."¹ There are three essential features that characterize a federal system of governance. First, there must be a provision for more than one level of government to act simultaneously on the same territory and on the same citizens. The American federal system is composed of a national government and the 50 states, both recognized by the Constitution. Local governments, within states, while not mentioned in the Constitution, are nevertheless key players in American federalism. Their power to regulate and legislate is derived from state Constitutions.

Second, each government must have its own authority and sphere of power, though they may overlap. When state and federal authority conflict, federal law is supreme under the Constitution. Article I, Sec. 8 of the Constitution delegates certain enumerated powers to the national government that include the exclusive power to mint currency, establish and maintain an army and navy, declare war, regulate interstate commerce, establish post offices, establish the seat of national government, and enter into treaties. The Constitution reserves powers not granted to the national government to states, or the people, and it establishes certain concurrent powers to be shared between state and national governments including the power to tax. In addition, the Constitution prohibits the exercise of certain powers or actions by both state and national governments including taking private land without just

¹ Wilson, James Q. and John J. DiIulio, Jr. *American Government Institutions and Policies*. Lexington, D.C. Heath and Company, 1995. p. A-49.

compensation; establishing a national religion; or prohibiting the free exercise of religion.

Third, neither level of government (federal or state governments) can abolish the other. The Civil War was fought not only on the question of slavery but also central to the conflict were questions of states' sovereignty including the power to nullify federal laws or dissolve the Union.

This report identifies several significant eras and events in the evolution of American federalism and provides a capsule description or discussion of each. It should be noted that among experts in the field of federalism there may be a general consensus concerning the evolution of American federalism; however, the choice of events and scholarly interpretations of such events may vary and are by nature subjective.

Pre-Federalism Period: 1775 to 1789

During this period, the former colonists successfully fought the War of Independence and established a national government under the Articles of Confederation. Disenchanted with the functioning of the national government, the states called a Constitutional Convention with the aim of addressing the deficiencies in the Articles of Confederation. Instead, the delegates drafted and the states ratified a new Constitution that created a federal system of government.

- 1776 – **Declaration of Independence.** In the midst of the Revolutionary War, which lasted from 1775 to 1783, delegates to the Continental Congress convened in Philadelphia and on July 4, 1776 adopted the **Declaration of Independence**. Each of the former colonies also established state governments to replace the colonial charters. The Continental Congress was given the power to carry on the war effort.
- 1777 – **Drafting Articles of Confederation.** The Continental Congress drafted the **Articles of Confederation**, which defined the powers of the Congress. Leery of a strong central government, the former colonists created a Confederation or “League of States” that was state-centered rather than nation-centered.
- 1781 – **Articles of Confederation approved by the States.** Under the Articles of Confederation legislative, judicial, and executive powers rested with Congress. The Articles of Confederation established a Congress comprised of one representative from each state; it limited the power of the central government; and it delegated to the states the power to levy taxes and regulate commerce. The Confederation Congress was given the power to declare war, make treaties, and maintain an army and navy. The Articles of Confederation had several noteworthy flaws that made it ineffective: 1) it did not provide for an executive to administer the government, 2) the national government

lacked the power to tax, and 3) it lacked the power to regulate commerce.

- 1786 – **Articles of Confederation Reconsidered.** Demand for re-examination of the Articles of Confederation was prompted by a post-Revolutionary War economic depression; rebellion in Massachusetts among debt ridden former soldiers, led by Daniel Shays (Shays Rebellion); concerns about the ability of the Confederation to support its currency or meet domestic and foreign debt incurred during the war; issues surrounding westward expansion; and state tariff conflicts. A group later known as Federalists, led by Alexander Hamilton, John Jay, and James Madison sought support for a strong central government that could deal with internal insurrections, arbitrate state tariff conflicts and other conflicts among states, and manage westward expansion. Members of the group called for a Constitutional Convention in 1787 to reconsider the Articles of Confederation.

- 1787 – **Drafting a New Constitution.** A Constitutional Convention met in Philadelphia from May until September and drafted a new Constitution. Under the new Constitution the central government, “... *in order to form a more perfect union*,” was given additional powers that included the power to levy taxes and control commerce among states and with foreign countries. In addition, the Convention created three co-equal branches of government – executive, judicial, and legislative. In a compromise (Connecticut Compromise) between rival plans offered by Virginia and New Jersey delegates, the Constitution called for the creation of a legislative branch composed of two chambers. Members of the House of Representative from each state were to be elected by the people of that state based on state population. The Senate would be comprised of two Senators from each state elected by their respective state legislatures. The Constitution included provisions that ensured the supremacy of federal laws (Article VI), but also recognized state powers and the power of the people. (Amendment X).

- 1787 &
1788 – **Campaigning for a New Constitution.** *The Federalist*, a series of 85 essays by Alexander Hamilton, John Jay, and James Madison, writing under the pen name *Publius*, was published during this period. The papers provided the philosophical underpinning in support of the new Constitution. Those opposed to the new Constitution (labeled Anti-Federalists but calling themselves Federal Republicans) also published articles under the pen names *Brutus* and *Cato*, arguing for support of a federal system of governance that would protect the state governments from the tyranny of the national government. The Anti-Federalists or Federal Republicans would eventually evolve into the Democratic Republican party that ascended to power with the election of Thomas Jefferson in 1801.

Dual Federalism Phase I: 1789 to 1865

The concept of **dual federalism** is the idea that the national and state governments were equal partners with separate and distinct spheres of authority. Despite the doctrine of implied powers, as first enunciated in *McCulloch v. Maryland*, the federal or national government was limited in its authority to those powers enumerated in the Constitution. There existed little collaboration between the national and state governments and occasional tensions over the nature of the union and the doctrine of nullification and state sovereignty. The states rights debate and the nature of the union – whether the Constitution created a league of sovereign states or an inseparable union – was a major issue in the Civil War.

1789 – **Constitution Approved by the States.** State ratifying conventions convened and ratified the new Constitution, which required 3/4ths (9) of the states to vote for its approval.

1789 to 1801 – **The Federalist Period.** The period takes its name from the dominant political party of the time, which believed in a strong central government. Its leaders included George Washington, Alexander Hamilton, John Adams. They were opposed by Anti-Federalists or Democratic Republicans, such as Thomas Jefferson, who argued against a strong central government and for state-centered governance. In 1790, the federal government assumed responsibility for the war debt, which some have called an early form of federal aid. In 1791, the first ten amendments—the Bill of Rights—were added to the Constitution after being ratified by 3/4ths of the states. The Tenth Amendment protected the rights of the states and declared that all powers not expressly delegated to the central government by the Constitution were reserved for the states. This laid the foundation for the concepts of states rights, limited national government, and dual spheres of authority between state and national governments.

In 1791, Congress established the Bank of the United States at the urging of Alexander Hamilton. Thomas Jefferson opposed the idea of a national bank. Congress granted the Bank a 20-year charter. Protracted debate over the constitutionality of the Bank by pro- and anti-bank factions led to the defeat of an effort to renew the Bank's charter in 1811. The charter renewal effort was defeated partly because of the restraints the Bank put on state chartered private banks in an effort to control inflation and because some viewed the concept of central banking as a attack on state sovereignty. Years later the central or national bank controversy was at the center of the debate concerning the enumerated powers clause of the Tenth Amendment.

- 1798 – **The Doctrine of Nullification.** A Federalist-controlled Congress in 1798 passed the Alien² and Sedition³ Acts in an attempt to silence Jeffersonian Democratic-Republican critics of the undeclared war with France. In response, Democratic-Republican controlled legislatures in Kentucky and Virginia passed resolutions supporting the concept of state-centered federalism and nullifying the Acts as unconstitutional. The **doctrine of nullification** held that any state could suspend within its boundaries the operation or implementation of any federal law it deemed to be unconstitutional. The Alien and Sedition Acts played a large part in the defeat of the Federalist party; they expired before the Supreme Court could hear a challenge to them.
- 1800s – **Internal Improvement Debate.** During this period there was significant debate concerning the role of the national government in the provision of roads and canals as a means of encouraging settlement and aiding commerce. The debate raised questions about whether the national government could participate in such activities without a constitutional amendment that provided explicit authority or whether such activities should be undertaken solely by states and private concerns.
- 1815 – **States’ Rights Doctrine.** The Hartford Convention, which was called to protest the economic hardships endured by New England states during the War of 1812, attempted to assert the “states’ rights doctrine.” The convention urged states to protect citizens against the acts of Congress not authorized in the Constitution.
- 1819 – **Doctrine of Implied Powers and the “necessary and proper” clause of Article I of the Constitution.** In 1816 the central bank was rechartered as the Second Bank of the United States. In 1819 the constitutionality of Congress’ authority to charter a national bank—the Second Bank of the United States—was upheld by the Supreme Court in *McCulloch v. Maryland* under the **doctrine of implied powers** and the **necessary and proper** clause of Article I of the Constitution. Chief Justice John Marshall, in writing the Supreme Court’s unanimous decision in support of Congress’ constitutional authority to establish a national bank, acknowledged that the national government was limited to powers enumerated in the Constitution (expressed powers), but stated that Article I also allowed the national government (Congress) to pass such laws “necessary and proper” to carry out powers and duties enumerated by the Constitution. Thus, the establishment of a national bank, though not explicitly sanctioned by the Constitution, nonetheless was an appropriate activity, under the doctrine of implied powers, that allowed the national government to carry out express powers, duties, or authority such as levying and

² 1 Stat 571 and 1 Stat 577

³ 1 Stat 596

collecting taxes, issuing currency, and borrowing funds. The Bank continued to be unpopular with Democratic-Republicans and in 1832, through political maneuvering, President Andrew Jackson, who opposed the Bank and characterized it as a “prostration of our government for the advancement of the few at the expense of the many,”⁴ severely crippled the Bank by transferring its funds to state-chartered private banks until its charter expired in 1836.

*McCulloch v. Maryland*⁵ settled the question of national supremacy for a time. Justice Marshall’s interpretation of the Constitution was premised on the notion that the national government was the creation of the people and not the states and that Article VI established federal law as the supreme law of the land (**supremacy clause**). Justice Marshall wrote that the *power to tax involves the power to destroy*. If the Bank, an entity of the federal government, could be taxed out of existence by the states it would be a breach of Article VI, one of the fundamental principles of the Constitution – the supremacy of the national government.

- 1824 – **Federal Regulation of Interstate Commerce.** *Gibbons v. Ogden*,⁶ addressed the issue of the scope of Congress’ authority under the **commerce clause** (Article I). The case involved a dispute over the use of the Hudson River. The New York state legislature had granted a company the exclusive right to the use of the river that was in conflict with Congress’ granting of a license to another ship. The Supreme Court ruled that the commerce clause of Article I granted Congress the power to regulate commercial activity and that the power to regulate commerce had no limits except those expressly stated in the Constitution. The Court prohibited the state from taking any action that would interfere with the free use of rivers and harbors.

- 1828 – ***South Carolina Exposition*:⁷ Rationale for Nullification Doctrine.** In 1828, John C. Calhoun of South Carolina, then Vice President in the Andrew Jackson Administration, argued against the imposition of a law passed by Congress that placed a tariff on domestic raw materials and reduced protection against imported woolen goods. Calhoun’s theory, which was published as the *South Carolina Exposition* and was to be used later by Southern states in their efforts to maintain the institution of slavery, contended that the national government was but a servant of the states and that the Constitution was a compact that directed the national government as an agent of

⁴ Jackson, Andrew. For and Against the Bank Renewal Bill. Andrew Jackson: Veto Message. In *The Annals of America*. Chicago, Encyclopedia Britannica, Inc., 1968. v. 5. p 535.

⁵ *McCulloch v Maryland*, 17 US 316, 4 Wheat 316, 4 Led 519 (1819).

⁶ *Gibbons v. Ogden*, 22 US 1, 9 Wheat 1, 6 Led 23 (1824).

⁷ Calhoun, John C., *The Essential Calhoun: Selections from Writings, Speeches, and Letters*, Clyde N. Wilson ed., New Brunswick, Transaction Publishers, 1992. p. 59-60.

the states in its actions. According to Calhoun's theory, the Supreme Court did not possess the power to rule on the validity of the actions of Congress, for it too was only an agent of the states. Calhoun's theory of nullification would have allowed a state to declare a federal law null and void within that state unless 3/4ths of the states ratified an amendment that granted Congress the power to enact the law. A state that challenged or nullified the law could either abide by the law or secede.⁸

- 1830 – **Webster/Hayne Debate on the Doctrine of Nullification.** In January, the Senate of the United States was the venue in which Senators Robert Y. Hayne of South Carolina and Daniel Webster of Massachusetts debated the issue of state sovereignty concerning a recent tariff act passed by Congress. Senator Hayne described the nation as a league or confederation of member states and argued that a state could refuse to obey any law passed by the Congress under the states' rights or nullification doctrine. During the debate Senator Hayne, who believed in limited national government argued "Liberty first and Union afterwards." Senator Webster, in response, argued that the Constitution was the creation of the people and not the states and retorted "Liberty and union, now and forever, one and inseparable."⁹
- 1832 – **South Carolina's Nullification Ordinance.** The South Carolina legislature passed an **Ordinance of Nullification**, which attempted to prohibit the implementation of Federal Tariff Acts of 1828¹⁰ and 1832¹¹ under the banner of state sovereignty and the doctrine of nullification.
- 1842 – **Testing the Constitution's Supremacy Clause and States' Rights Doctrine.** In *Prigg v. Pennsylvania*,¹² the United States Supreme Court ruled as unconstitutional state-passed "personal liberty" laws enacted by northern states to protect free blacks and fugitive slaves. The Supreme Court ruled that such laws were in conflict with the Fugitive Slave Act passed by Congress in 1793,¹³ and thus violated the supremacy clause of the Constitution.

⁸ O'Connor, Karen and Larry J. Sabato. *American Government: Roots and Reform*, New York, McMillan Publishing Company, 1993. p.71.

⁹ Webster, Daniel. Congressional Debates. Mr. Foot's Resolution. 21st Cong., 1st Sess. Washington, In *Gales and Seaton's Register*, v. 6, part 1. Gales and Seaton, 1830. p. 80.

¹⁰ 4 Stat. 270.

¹¹ 4 Stat. 583.

¹² *Prigg v. Pennsylvania*, 41 US 539, 16 Pet 539, 10 Led 1060 (1842).

¹³ 1 Stat. 302.

- 1850 – **Prelude to the Civil War.** The Fugitive Slave Act of 1850¹⁴ was passed by Congress in an effort to preserve the union. In 1854 the Wisconsin Supreme Court declared the Fugitive Slave Act of 1850 unconstitutional. The U.S. Supreme Court overturned the State Supreme Court decision, which involved Sherman Booth, a noted abolitionist who freed Joshua Glover, a fugitive slave. The Wisconsin legislature, enunciating the doctrine of nullification and states' rights, declared null and void the Supreme Court decision that reversed the State Supreme Court decision. In 1857 the U.S. Supreme Court in *Scott v. Sandford*¹⁵ rebuffed northern abolitionists and declared the Fugitive Slave Act constitutional.
- 1860 – **The Civil War: Testing Federalism.** Civil War addressed two central issues: 1) the role of the federal government and 2) the nature of the union. Slavery accelerated tensions between nation-centered and state-centered concept of the federal system. On the one hand, there were those who argued that the union was but a league of sovereign states and that each state had the power to nullify federal laws within its boundaries or ultimately secede from the union. On the other side were those who believed that the union was indestructible, created not by the states but by the people delegating to the states and the national government certain limited authority enunciated in the Constitution. The question of the nature of the union was resolved in favor of a nation-centered concept of federalism.

The role of the national government was also profoundly influenced by the Civil War. Before the Civil War, the role of government was generally characterized by decentralization. The national government acted as servant to the states. During the War, state militia and state-recruited volunteers were replaced by a policy of federal conscription and the national government reclaimed control over currency and banking, which had been delegated in large part to the states during the 1830s.

Dual Federalism Phase II: 1865 to 1901

Although the era of dual federalism continued, this period was marked by erratic but increasing presence of the national government into areas that had previously been the purview of the states. The Sherman Anti-trust Act, the Interstate Commerce Commission Act, as well as the Twelfth, Fourteenth, and Fifteenth Amendments were significant events that pushed federal authority into areas such as the power to regulate business and the economy, as well as civil rights. In the midst of the industrial revolution, in an effort to control the monopolistic tendencies of business, Congress passed legislation that attempted to control commerce. Congress' authority

¹⁴ 9 Stat. 462.

¹⁵ *Scott v. Sandford*, 60 US 393, 19 How 393, 15 Led 1123 (1842).

to control commerce was at the center of several legal disputes. In a series of court cases, the power of the national government (Congress) to regulate commerce was upheld. Two of the more notable laws are the Interstate Commerce Commission Act of 1887 and the Sherman Anti-trust Act of 1890. Court cases included *Munn v. Illinois*¹⁶ and *Wabash, St. Louis, and Pacific Rail Road v. Illinois*¹⁷ rendered in 1886, in which the Court held that the state could not regulate rail rates if, as a consequence, it affected a portion of the rate charged in transportation of goods across state lines. In the area of civil rights, the Court was far more restrictive in its interpretation of the Fourteenth Amendment's equal protection, due process and privileges and immunities clauses. In a series of cases, including *Plessy v. Ferguson* and *Bradwell v. Illinois*, the Court rulings upheld state laws restricting the freedoms and constitutional protections of certain gender or racial classes (women and minorities).

- 1868 – **Due Process and Equal Protection Clauses of the Constitution.** The Fourteenth Amendment's **due process and equal protection** clauses strengthened federal judicial powers. The Amendment, originally drafted to protect the newly freed slaves from arbitrary and capricious state actions, was used to constrain the unfair practices of businesses. According to some scholars, the Amendment, which granted Congress the power to enforce its substantive provisions, laid the foundation for future federal expansion.

- 1873 – **Doctrine of States' Rights Revived.** *Slaughterhouse Cases*¹⁸ and *Bradwell v. Illinois*.¹⁹ The Supreme Court played a pivotal role in two civil rights cases that tested the **privileges and immunities** clause of the Fourteenth Amendment. The Supreme Court, in its rulings in the *Slaughterhouse Cases* and *Bradwell v. Illinois*, noted that state and national citizenship were separate and distinct. In the *Slaughterhouse Cases* the Supreme Court upheld the state of Louisiana's right to confer upon one company the right to butcher cattle in the city of New Orleans, thus creating a monopoly in the operation of slaughterhouses. In *Bradwell v. Illinois* the Supreme Court held that a state could bar women from the practice of law. The Court's rulings in these and other cases revived the doctrine of states rights.

- 1887 – **Interstate Commerce Commission Act.**²⁰ The Act further strengthened Congress' role in the regulation of commerce among states.

¹⁶ *Munn v. Illinois*. 94 US 113, 24 Led 77 (1886).

¹⁷ *Wabash, St. Louis, and Pacific Rail Road v. Illinois*. 7 Set 4, 118 US 557, 30 Led 244 (1886).

¹⁸ *Slaughterhouse Cases*. 83 US 36, 16 Wall 36, 21 Led 394 (1873) and 77 US 273, 10 Wall 273, 19 Led 915 (1873).

¹⁹ *Bradwell v. Illinois*. 83 US 130, 16 Wall 130, 21 Led 442 (1873).

²⁰ 24 Stat. 462.

- 1890 – **Sherman Anti-trust Act.**²¹ The Act allowed Congress to control the formation of business monopolies and signaled a larger role for the national government in the economy.
- 1896 – **Civil Rights, States' Rights and the Separate but Equal Doctrine.** In *Plessy v. Ferguson*,²² the Supreme Court established the doctrine of separate but equal, upholding a Louisiana law that mandated racially segregated accommodation on trains, ruling that so long as the segregated facilities were equal they were not a violation of the Fourteenth Amendment's **equal protection clause**. The doctrine was overturned in 1954 in *Brown v. The Board of Education of Topeka, Kansas*.²³ In *Williams v. Mississippi*²⁴ the Supreme Court validated the use of state literacy tests. The Court's ruling allowed a state to determine standards under which persons would gain the right to vote. The application of literacy tests had a discriminatory impact on blacks.

Cooperative Federalism: 1901 to 1960

This period marked an era of greater cooperation and collaboration between the various levels of government. It was during this era that the national income tax and the grant-in-aid system were authorized in response to social and economic problems confronting the nation. Though the first part of the 20th century has been characterized by some federalism scholars as one of inactivity, by 1920 eleven grant programs had been created and funded at a cost of \$30 million. During this period the federal government was seen as “servant of the states” in the kinds of activities funded. The federal grant system, spurred by the Great Depression, was expanded and fundamentally changed the power relations between federal and state governments.

- 1910 – **New Nationalism.** President Theodore Roosevelt's **New Nationalism** initiative sought to expand the powers of the national government. His view of government contended that matters of national concern had become too decentralized or as he stated:

“[The New Nationalism] is still more impatient of the impotence which springs from overdivision of governmental power, the impotence which makes it possible for local selfishness or for legal cunning, hired by wealthy special interests, to bring national activities

²¹ 26 Stat. 209.

²² *Plessy v. Ferguson*, 18 Sct 1138, 163 US 537, 41 Led 256 (1896).

²³ *Brown v. Board of Education of Topeka, Kansas*. 73 Sct 1, 344 US 1, 97 Led 3 (1954).

²⁴ *Williams v. Mississippi*. 18 Sct 583, 170 US 213, 42 Led 1012 (1896).

to a deadlock. The New Nationalism regards the executive power as the steward of the public welfare.”²⁵

- 1913 – **New Freedom Program.** As an academician, Woodrow Wilson noted that:

“The question of the relation of the States to the federal government is the cardinal question of our constitutional system. At every turn of our national development, we have been brought face to face with it, and no definition either of statesmen or of judges has ever quieted or decided it.”²⁶

As President, Woodrow Wilson built upon the Roosevelt program. He sought to continue the trend toward more active national cooperation with other governments. Daniel J. Elazar, a noted scholar of federalism, contends that Wilson, in line with congressionally-determined national policies, expanded the federal role beyond “servant of the states.”²⁷

- 1913 – **Sixteenth Amendment.** The Amendment, which authorized the income tax, provided the means of developing and expanding the grant-in-aid system. “If grants-in-aid are the power that drive the federal engine then the income tax is the fuel that powers it.”²⁸

1933 to

- 1938 – **New Deal.** President Franklin D. Roosevelt and the Congress in response to the economic calamity of the Great Depression further expanded the federal role in domestic affairs. States were unable to respond effectively on their own. The expansion of national government in economic and social policy was seen as a necessary means of addressing grave national economic conditions. During this period 16 on-going programs were established. The New Deal era has been characterized as “the geological fault line” in the history of federalism, particularly in the area of federal-local relations.²⁹

²⁵ Roosevelt, Theodore, New Nationalism. In *The Annals of America*. Chicago, Encyclopedia Britannica, Inc., 1968. p. 253-254.

²⁶ Wilson, Woodrow. *Constitutional Government in the United States*. New York, Columbia University Press, 1961. p. 173.

²⁷ Elazar, Daniel J. The Evolving Federal System. In Pious, Richard, ed. *The Power to Govern: Assessing Reform in the United States*. Proceedings of the Academy of Political Science, v. 34, 1981. p. 6.

²⁸ CRS Archived Report 82-139 GOV, *Federalism: Key Episodes in the History of the American Federal System*, by Sandra Osbourn, August 16, 1982. p. 33.

²⁹ *Ibid.*, p. 38.

- 1953 – **Commission on Intergovernmental Relations.**³⁰ Congress created the Commission on Intergovernmental Relations (CIR), which later evolved into the Advisory Commission on Intergovernmental Relations. The CIR was a temporary study commission comprised of persons appointed by the President and Congress. Its mission was to review federal aid to state and local governments, to determine if federal aid and involvement were appropriate, and to assess the fiscal capacity of the federal government and the states to undertake various activities.
- 1954 – **Civil Rights and States' Rights Reconsidered.** *Brown v. Board of Education of Topeka, Kansas* struck down, as unconstitutional, an earlier decision (*Plessy v. Ferguson*) and the doctrine of “separate but equal” public accommodations for blacks. The Justices cited the Fourteenth Amendment’s due process and equal protection clause noting that racially segregated schools were inherently unequal. *Brown* prompted a new wave of action by states intent on resisting the Court’s decision, including the resurrection of states’ rights under the **doctrine of interposition**, which contended that a state government may interpose itself between an improper national act and the state’s citizens.
- 1959 – **Advisory Commission on Intergovernmental Relations (ACIR).**³¹ ACIR was created by Congress to monitor intergovernmental relations and the operation of American federalism and to report to Congress, on a continuing basis, recommended improvements. Unlike its CIR predecessor ACIR is a continuing body comprised of representatives from federal, state, and local governments.

Creative Federalism: 1960 to 1968

President Lyndon Johnson’s Creative Federalism as embodied in his Great Society program, was, by most scholars’ assessments, a major departure from the past. It further shifted the power relationship between governmental levels toward the national government through the expansion of grant-in-aid system and the increasing use of regulations.

- 1962 – **Supreme Court Forces Reapportionment.** The Supreme Court’s ruling in *Baker v. Carr*³² is a noted example of judicial intervention into state political affairs on constitutional grounds. The Tennessee General Assembly had not reapportioned legislative districts since 1901 despite a state constitutional requirement to apportion according to population. The migration of people from rural to urban areas

³⁰ 67 Stat. 145.

³¹ 42 USC 4271

³² *Baker v. Carr*. 82 Sct 691, 369 US 186, 7 L ed2d 663 (1962).

without legislative districts being redrawn to reflect population shifts had resulted in city residents being under-represented in the state legislature. The Supreme Court required the reapportionment of legislative districts based on population (proportional representation). The Supreme Court ruled that the denial of equal representation (districts equal in population size) was a violation of the equal protection clause of the Fourteenth Amendment. Based on standards established by the Supreme Court, every state except Oregon was forced to reapportion to achieve districts equal in population. Another legacy of *Baker v. Carr* was the reinvigoration of the practice of gerrymandering of legislative districts after each decennial Census in order to achieve or maintain some political advantage.

- 1964 – **Creative Federalism and the Great Society.** Creative Federalism and the Great Society sought to expand the national government's role in an effort to achieve socially desirable outcomes (i.e. reductions in poverty, elimination of hunger). Prior to the Johnson Administration, federal involvement often had to be justified as a necessary evil in order to legitimize intrusion into state and local affairs. Under the new theory, federal involvement was justified as long as Congress could establish a national purpose for such actions. The Great Society programs used states and local governments as intermediaries or agents to implement national policies, and the volume of federal regulations increased as the federal government became increasingly involved in areas that had previously been the purview of state and local governments or the private sector.

Contemporary Federalism: 1970 to 2000

This period has been characterized by shifts in the intergovernmental grant system, the growth of unfunded federal mandates, concerns about federal regulations, and continuing disputes over the nature of the federal system.

- 1970s – **New Federalism: Phase I.** During the 1960s concerns were raised about the intergovernmental grant system, particularly about duplication, fragmentation, overlap, and confusion. These concerns resulted in attempts by the Richard Nixon and Gerald Ford Administrations to redirect power relations within the federal system. The Administrations' principal tools were revenue sharing and the consolidation of federal aid programs into six special revenue sharing programs. The intent was to shift funds, authority, and responsibility to states and local governments in an effort to more effectively manage the intergovernmental grant system. Though not completely successful, the Nixon era did recast the debate on the roles of various levels of governments.

- 1976 – **Commerce Clause, Enumerated Powers, and State and Local Governments.** *National League of Cities v. Usury*³³ addressed the conflict between the Tenth Amendment’s **enumerated powers** clause, which limited the federal government’s power to those specified in the Constitution and the **commerce clause** of Article I, which bestowed upon the national government the power to regulate commerce. In ruling on the constitutionality of the Fair Labor Standards Act,³⁴ which established minimum wage and maximum working hours for private and public sector employees, the Supreme Court addressed one of the fundamental issues in federalism: to what extent may the Congress impose upon the sovereignty of the states. The Supreme Court ruled that the Fair Labor Standards Act’s 1974 amendments, which extended hour and wage coverage to state and local public employees, violated state sovereignty as protected under the Tenth Amendment.
- 1980s – **New Federalism: Phase II.** Initiatives of the Ronald Reagan Administration stimulated the debate on the appropriate roles of federal, state, and local government. President Ronald Reagan, rather than attempt to more rationally manage federal aid as was the case in the Nixon Administration, sought to fundamentally restructure the system of governance. In his 1981 inaugural address, President Reagan raised an issue as old as the Republic: what is the nature of the union? The President stated that “the federal government did not create the states, the states created the federal government.”³⁵ This statement expressed the sentiments found in the Virginia and Kentucky Resolutions, the Webster/Hayne debate, the doctrine of nullification and state sovereignty and the states’ rights philosophy. The modern debate has also been fueled by dissatisfaction with the effectiveness and efficiency of the national government. In 1981 Congress passed the Omnibus Budget Reconciliation Act that consolidated a number of social programs into nine block grants, which allowed for greater state and local autonomy and flexibility in the fashioning of local strategies to address federal objectives. The Administration was not successful in the second phase of New Federalism, which would have reallocated federal and state responsibility and resources for welfare, food stamps, and Medicare and would have turned back revenue sources to the states. The George Bush Administration also offered a turn back proposal.

³³ *National League of Cities v. Usury*. 96 Sct 2465, 426 US 833, 49 L ed2d 245 (1976).

³⁴ 29 USC 201.

³⁵ General Services Administration. National Archives and Records Service. Office of the Federal Register. *Public Papers of the Presidents — Ronald Reagan 1981*. Inaugural Address January 20, 1981. Washington, U.S. Govt. Print. Off., 1982. p 2.

- 1985 – *National League of Cities v. Usury Reconsidered* In *Garcia v. San Antonio Metropolitan Transit Authority*³⁶ the Supreme Court revisited the issue of state sovereignty and state and local government protection from the imposition of federal actions. *Garcia v. San Antonio* reversed *National League of Cities v. Usury*. *Garcia* has had two significant impacts on federalism, according to some scholars. One, under *Garcia* the Supreme Court held that the Tenth Amendment does not protect state and local governments from compliance with the Fair Labor Standards Act, which is counter to the concept of dual federalism. Two, the Court seemed to be backing away from its role as final arbiter or interpreter of the Constitution in disputes between political branches of the federal government and the states. The Court appeared to be allowing such disputes to be resolved by the “political”—that is the legislative—branch of government.
- 1992 to
1995 – **New Federalism: Phase III.** The Bill Clinton Administration’s *Reinventing Government Initiative* and the House Republicans’ *Contract with America* are efforts to rearrange the power relationships in the federal system. Both efforts seek to devolve greater authority to lower levels of government. However, the initial reinvention effort, as embodied in its *National Performance Review Creating A Government that Works Better and Costs Less*,³⁷ concentrated on achieving management efficiencies at the federal level. Practical outcomes have included the issuance of E.O. 12866,³⁸ which encourages regulatory reform such as coordinating and consolidating planning and review requirement among complementary federal programs. *The Contract with America*,³⁹ is a document signed by Republicans campaigning for House seats during the 1994 election season. It includes drafts of the House Republicans’ ten legislative priorities for the first 100 days of the 104th Congress, several of which focused on changing the power relationships between the national and state governments. Presently, it has refocused debate on the role of government and what level of government is best suited to carry out certain functions. The present federalism debate has resulted in the passage of unfunded federal mandate legislation, which requires the federal government to assess the cost/benefit impact of

³⁶ *Garcia v. San Antonio Metropolitan Transit Authority*. 105 Sct 1005, 83 Lcd2d 1016 (1985).

³⁷ Report of the National Performance Review. *From Red Tape to Results, Creating a Government that Works Better and Costs Less*. Vice President Al Gore. Washington, September 7, 1993. U.S. Govt. Print. Off., 1993.

³⁸ U.S. President, 1992- (Clinton). Executive Order 12866, Regulatory Planning and Review. *Federal Register*, v. 58, October 4, 1993. p. 51734.

³⁹ Gingrich, Newt, Dick Armey, and the House Republicans. *Contract with America*. Gillespie, Ed and Bob Schellhas, eds. New York, Times Books, 1994. p. 196.

federal legislation on states, local governments, and the private sector; has fueled discussions concerning the possible elimination of several federal departments; has prompted action to reform the regulatory process; and has caused the consideration of legislation that would eliminate, downsize, consolidate, or block grant a number of federal programs in an effort to foster greater flexibility and control by state governments. This debate has been driven by fiscal and philosophical factors including the desire to reduce the federal deficit, to achieve management efficiencies at the federal level, and to reconsider the proper roles of federal, state, and local governments.

1995 to
1997

- The 104th Congress convened with the historic installation of a Republican majority in both houses of Congress. Taking control of the House of Representatives after 40 years in the minority, the new Republican majority moved quickly to fulfill its *Contract with America*. Among the accomplishments of the 104th Congress was the passage of the Unfunded Federal Mandate Reform Act of 1995, P.L. 104-4, which requires the federal government to assess the cost/benefit impact of federal legislation and regulations on states, local governments, and the private sector. The Congress also considered but failed to win passage of a balance budget amendment that if approved by the states would have significantly affected the intergovernmental grant system and the relationships between the national government and states and localities.

The second session of the 104th Congress brought a renewed push on several federalism/intergovernmental relations issues. Congress passed legislation restructuring the delivery of rural development services, creating new block grants in the areas of law enforcement, rural development, and welfare. Other block granting proposals consolidating job training, education, food stamps, and medicaid failed to win final congressional approval. The Congress also passed a sweeping telecommunications act including provisions reaffirming the authority of state and local governments to regulate and manage public rights-of-way, requiring reasonable compensation for the use of public rights-of-way, and prohibiting the preemption of local zoning authority in the siting of cellular towers. In addition, the Act preempts local, but not state, taxation of direct satellite broadcast services. For his part, President Clinton vetoed product liability legislation that would have preempted state tort laws governing the awarding of damages in civil cases.

- **State's Rights and Responsibilities Revived.** In 1985, in *Garcia v. San Antonio Metropolitan Transit Authority*, the Supreme Court declared that states must find redress from congressional regulation through the political/legislative process and not the judiciary. In more recent cases, however, the Court has provided ample evidence that the era of judicial restraint may be over in matters of federalism and the power relationships between the federal government and the states.

Starting with *New York v. United States*⁴⁰ and including *United States v. Lopez*⁴¹ and *Seminole Tribe of Florida v. Florida*,⁴² the Supreme Court has taken a more activist role, limiting the power of the federal government and narrowing the Court's interpretation of the commerce clause in favor of state rights.

In 1992, in *New York v. United States*, the Supreme Court declared unconstitutional provisions of the Low Level Radioactive Waste Policy Amendments Act of 1985.⁴³ The Act required states to establish sites for the disposal of non-federal radioactive waste generated by businesses within their borders. States failing to establish such disposal sites were to be legally liable for damages incurred by businesses such as hospitals, nuclear utility companies, and medical research labs that generate low-level radioactive material. In a victory for states' rights advocates, the Supreme Court ruled that under the Tenth Amendment, the federal government could not compel states to enact or administer a federal regulatory program.

In a second victory for states, the Supreme Court, in 1995, in *United States v. Lopez*, in a 5-4 decision, narrowed the interpretation of the **commerce clause** when declaring the Drug Free School Zone Act of 1990⁴⁴ unconstitutional. The Act made it a federal crime to possess a gun within 1,000 feet of a school. The Court ruled that the Act could not be justified under the **commerce clause** of the Constitution. The Court's narrow decision was seen as a victory for states' rights advocates who asserted that the Act intruded on the law enforcement responsibilities of states.

In a third decision, *Seminole Tribe of Florida v. Florida*, affirming the sovereignty of states, the Supreme Court ruled that the Indian Gaming Regulatory Act of 1988⁴⁵ allowed Indian tribes to undertake certain gambling activities on Indian lands only after entering into a compact with the state in which the gaming activity is to be located. The Act gave Indian tribes the right to sue states in federal court to compel good faith negotiations in establishing the compact. The Supreme Court ruled the provision allowing Indian tribes to sue states in federal court unconstitutional because it violated the Constitution's Eleventh Amendment restriction prohibiting any person from suing a state in federal court, without the state's permission.

⁴⁰ *New York v. United States*. 488 U.S. 1041 (1992).

⁴¹ *United States v. Lopez*. 115 Sct 1624, 131 Ld2d 626 (1995).

⁴² *Seminole Tribe of Florida v. Florida*. 116 Sct 1114, 134 Ld2d 252 (1996).

⁴³ 99 Stat. 1842.

⁴⁴ 18 USC 922.

⁴⁵ 102 Stat. 2475.

- *U.S. Term Limits, Inc. v. Thornton*, **Congressional Term and the Concept of Dual Citizenship.** In a defeat for states' rights advocates, the Supreme Court, in a 5-4 decision, declared term limit legislation enacted by several states unconstitutional. Proponents of term limit legislation argued that the Constitution (Article 1, Section 4) allowed each state to fix the time, place, and manner of elections for Senators and Representatives of Congress. The Supreme Court ruling reaffirmed the concept of dual citizenship enunciated in 1873 in the *Slaughterhouse Cases* and *Bradwell v. Illinois*. The Court ruled that a state could not add to the qualifications for federal office as enunciated in Article I of the Constitution. Further, Justice Kennedy, in a concurring opinion, noted that term limits violate the "fundamental principles of federalism." He argued that there exists a federal right of citizenship, a relationship between the people ... and their National Government, with which the states may not interfere."
 - **Advisory Commission on Intergovernmental Relations Abolished.** Federal financial support for the independent federal agency, which began its work in 1959, terminated in 1996.
- 1997 to 2000
- During these years, the trend toward devolution continued to dominate the debate over the character of American federalism, as Republican majorities in Congress pursued their program. Continued Republican control of Congress had facilitated the change toward greater state authority. Examples may be found in legislation, executive orders, and Supreme Court cases.
 - **Legislative Preemption.** Legislatively, few proposals that affect federalism were enacted during this three year period. The most noteworthy among these proposals dealt with issues involving federal preemption of state taxing authority and federal grant management. In 1998, Congress passed the Internet Tax Freedom Act, P.L. 105-277, which was included in Omnibus Consolidated Supplemental Appropriations Act of 1999. The Act placed a three-year moratorium on taxing of Internet commerce and access. The House sought to extend this moratorium to five years when it passed H.R. 3709, the Internet Nondiscrimination Act of 2000, but the bill was not acted upon by the Senate. The legislation would have preempted states that sought to tax revenue generated from such economic activity. Several groups representing state and local officials, and led by the National Conference of State Legislators, opposed the moratorium and, instead, called for a voluntary multi-state system to collect and administer existing sales and use taxes for internet commerce. The congressional preemption removed that proposal as a possible option for the states.

In 1999, Congress also considered and passed the Financial Services Modernization Act, P.L. 106-102. The Act preempts some state laws regarding licensing insurance agents and state authority over the legal status of mutual insurance companies.

- **Continued Devolution.** Also in 1998, Congress passed the Workforce Investment Act, P.L. 105-220, replacing the Job Training Partnership Act as the primary source of federal support for employment training programs. The Act was designed to consolidate, coordinate, and improve employment, training, literacy, and vocational rehabilitation programs in the United States. It is characterized by many as a block grant, a cornerstone of intergovernmental devolution.
- Also in 1999, Congress approved the Federal Financial Assistance Management Act, P.L. 106-107. The Act directs each federal agency to streamline and simplify application, administration, and reporting requirements of federal grants and other assistance. It also directs the Office of Management and Budget to develop uniform rules for crosscutting requirements relating to civil rights, environmental policy, and labor standards.
- **Executive orders.** Executive Orders also addressed federalism issues during this period. Executive Order 13132, issued by President Clinton on August 10, 1999, delineated “the division of governmental responsibilities between the national government and the states.”⁴⁶ In that regard, the order sought to strike a balance between the rights and responsibilities of the states with the authority of the national government.⁴⁷ The order also sought “to ensure that the principles of federalism established by the Framers guide the executive departments and agencies in the formulation and implementation of policies.”⁴⁸ The order built upon provisions in two revoked orders – E.O. 12612, issued by President Reagan on October 30, 1987; and E.O. 12875, issued by President Clinton on October 28, 1993. Indeed, E.O. 12132 retained much of the language of the revoked orders. The major difference is that it required federal agencies to establish an ongoing consultation process involving state and local officials in discussions prior to the release of proposed regulations or legislation.

The order succeeded E.O. 13083, which was criticized on a number of grounds, notably that it lacked sufficient input from state and local governments, and emphasized the supremacy of the national government. The criticism and controversy pitted state and local officials, and their advocates in Congress, against the President. Further, opponents of the order expressed concern that the criteria the Administration set for federal involvement in domestic issues would

⁴⁶ U.S. President (Clinton), “Federalism,” Executive Order 13132, *Federal Register*, vol. 64, Aug. 10, 1999, p. 43255.

⁴⁷ For a detailed discussion of the differences between executive orders 13132, 12875, and 12612, see: CRS Report RL30362, *Federalism: A Comparison of Executive Orders 13132, 12875, 12612*, by Keith Bea.

⁴⁸ *Ibid.*

open the door to increased federal intervention into what some analysts considered areas of state sovereignty. The order was suspended⁴⁹ in the wake of the criticism, and after a congressional hearing on the order in which some witnesses emphasized the sovereignty of states on certain issues.⁵⁰ Contributing to the suspension of the order was legislation prohibiting the expenditure of funds for its implementation,⁵¹ and the introduction of a measure to enact alternative policy.⁵²

- **Judicial Strengthening of States’ Rights.** The Supreme Court emerged as a major arbiter for determining the character and direction of contemporary American federalism. The Court’s emergence in this regard was due, primarily, to its interpretations of the interstate commerce clause and the Tenth and Eleventh Amendments. While all of the cases handled by the Court did not favor states’ rights, the trend was one of siding with the states and against the federal government, thereby limiting congressional and presidential power. Noteworthy among these Court decisions were *Printz v. United States*,⁵³ *Alden v. Maine*,⁵⁴ and *Kimel v. Florida Board of Regents*.⁵⁵

Printz v. United States (1997) concerned a challenge to a provision of the Brady Handgun Violence Prevention Act of 1993 that required the Attorney General to establish a national system for instantly checking prospective handgun purchasers’ backgrounds. The provision further commanded the “chief law enforcement officer” (CLEO) of each local jurisdiction to conduct such checks and perform related tasks on an interim basis until the national system became operative. CLEOs for counties in Montana and Arizona filed suit against the provision, arguing that it was an unconstitutional violation of state sovereignty. The Supreme Court ruled on June 27, 1997, that the Brady Act provision was an unconstitutional encroachment on states’ powers.

⁴⁹ U.S. President (Clinton), “Suspension of Executive Order 13083,” *Federal Register*, v. 63, Aug. 7, 1998, p. 52565.

⁵⁰ U.S. Congress, Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs, Committee on Government Reform and Oversight, *Clinton-Gore v. State and Local Governments*, hearing, 105th Cong., 2nd sess., July 28, 1998 (Washington, D.C.: GPO, 1998), p. 332.

⁵¹ Congress inserted an amendment into the HUD/VA appropriations for FY 1999 (P.L. 105-276). See: Representative Joe Scarborough, remarks in the House, *Congressional Record*, daily edition, vol. 144, July 29, 1998, p. H6571-H6573.

⁵² Refer to H.R. 4422, S. 2445, 105th Congress.

⁵³ 521 U.S. 98 (1997).

⁵⁴ 119 S. Ct. 2240 (1999).

⁵⁵ 120 S. Ct. 631 (2000).

In *Alden v. Maine* (1999) the Supreme Court ruled that, as with federal courts, state sovereignty immunized states from suits brought in state court. Consequently, state employees could no longer sue to enforce the Fair Labor Standards Act against state governments. In *Kimel v. Florida Board of Regents* (2000), the Court ruled that Congress lacked authority to make the states, as employers, liable to suit under the federal Age Discrimination in Employment Act of 1967.

- **Limited Federal Supremacy.** While the Supreme Court moved toward reducing federal authority over the states, there were some rulings that maintained the supremacy of federal law. Among the noteworthy cases in this regard were *Reno v. Condon*,⁵⁶ *Crosby v. National Foreign Trade Council*,⁵⁷ and *United States v. Locke*.⁵⁸
- In *Reno v. Condon* (2000), the Supreme Court unanimously rejected a states' rights challenge to the Drivers Privacy Protection Act, a federal law that bars states from selling personal information about licensed drivers and automobile owners. In *Crosby v. National Foreign Trade Council*, the Supreme Court held that a federal law placing sanctions on the nation of Myanmar, formerly Burma, preempted a Massachusetts law that withheld state business from companies that do business with that nation's military regime. In *United States v. Locke*, the Supreme Court cited the longstanding federal interest in uniform rules for interstate navigation to invalidate the State of Washington safety and environmental regulations for tanker traffic along its coast. The Court ruled unanimously that federal laws covering tankers take precedence over state regulations.

⁵⁶ 120 S. Ct. 666 (2000).

⁵⁷ 2000 U.S. Lexis 4153

⁵⁸ 530 U.S. 363.

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